IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FOTOMEDIA TECHNOLOGIES, LLC	§	
	§	
Plaintiff,	§	Case No. 2:07-CV-255-TJW
	§	
v.	§	Judge: Honorable T. John Ward
	§	
AOL LLC, AMERICA ONLINE, INC., PHOTOBUCKET.COM, INC., SHUTTERFLY, INC., CNET NETWORKS, INC., AND YAHOO! INC.,	§ § § § §	**JURY TRIAL DEMANDED**
	§	
Defendants.	§	

AMERICA ONLINE, INC.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION PURSUANT TO FRCP 12(B)(2) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendant America Online, Inc. ("New America Online") respectfully moves, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, to dismiss the action against it for lack of personal jurisdiction.

I. SUMMARY OF ARGUMENT

America Online, Inc., a company with no operations or assets, and hence no contact with the State of Texas, is not subject to the jurisdiction of this Court. In order for the Court to have personal jurisdiction, Plaintiff must show that New America Online has sufficient minimum contacts with the State of Texas to establish either specific or general jurisdiction. Because New America Online has no contacts with the state due to its lack of operations and assets in the state, this Court does not have personal jurisdiction, and claims by Fotomedia Technologies, LLC ("Fotomedia") against America Online should be dismissed.

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II. BACKGROUND

FotoMedia filed a complaint alleging patent infringement against five different companies. Among them are two related but separate and distinct companies, AOL LLC, and America Online, Inc. Only one of these two companies, AOL LLC, has any operations or assets. America Online, Inc. is a company that exists in name only.

AOL LLC is a Delaware limited liability company which was originally formed on May 14, 1985 as Quantum Computer Services, Inc. Declaration of Katherine E. Wychulis Certifying America Online, Inc.'s Corporate Status (hereinafter "Wychulis Decl."), ¶3. On November 27, 1991, Quantum Computer Services, Inc. changed its name to America Online, Inc., a pioneer in the then-emerging online community *Id.* On April 3, 2006, America Online, Inc. was converted to a limited liability company and changed its name to AOL, LLC ("AOL"). *Id.* All of the operations and assets of the original America Online, Inc. are owned by AOL, as evidenced by the fact that the Delaware Corporate ID numbers for the two companies are identical. *Id* at ¶ 6. Therefore, the company that many consumers (and FotoMedia, for that matter) might think of as "America Online" is in fact AOL.

On May 12, 2006, AOL created a new company called America Online, Inc. ("New America Online"). *Id.* at ¶3. This company was formed and organized under the laws of Delaware. *Id.* New America Online is an entity separate and apart from AOL LLC. *Id.* at ¶4. AOL's sole purpose in creating New America Online was to help protect AOL's rights to the name "America Online, Inc." *Id.* at ¶4. As such, it is a company in name only - New America Online has no operations or assets. *Id.* at ¶ 5. Because New America Online has no operations or assets in Texas or anywhere else, it has no business activities in the State of Texas.

III. ANALYSIS

America Online is subject to personal jurisdiction in this court only if it is subject to service under the Texas long arm statute and such assertion of personal jurisdiction is consistent with the Due process requirements of the United States Constitution. *Redwing Shoe Co. v. Hockerson-Halberstadt, Inc*., 148 F.3d 1355, 1358 (Fed.Cir. 1998). Since Texas courts have interpreted the Texas long arm statute to allow service of process to the extent that jurisdiction over the person is consistent with due process limits, the only issue is whether asserting personal jurisdiction over America Online violates due process requirements. *Auto Wax Co. v. Kasei Kogyo Co*., No. A 00 CA 531 SS, 2001 U.S. Dist. LEXIS 24023, at *4 (W.D.Tex. Sept. 26, 2001). To satisfy the due process requirements, two elements must be met: (a) the non-resident must have some minimum contacts with the forum state which results from an affirmative act on the defendant's part; and (b) maintaining a suit over the defendant must not offend "traditional notions of fair play and substantial justice." *Nutrition Physiology Corp. v. Enviros Ltd.*, 87 F. Supp. 2d 648, 651 (N.D. Tex. 2000). The law of the Court of Appeals for the Federal Circuit governs the determination of whether these elements are met. *Redwing Shoe Co.*, 148 F.3d at 1358. The first element evaluated in a due process analysis is whether or not a defendant has sufficient minimum contacts with the jurisdiction "such that [it] should reasonably anticipate being haled into court". *Id*. at 1359. A defendant's contacts may give rise to either specific or general jurisdiction. *Nutrition Physiology Corp.*, 87 F. Supp. 2d at 652. A court need not reach the issue of whether assertion of jurisdiction offends traditional notions of "fair play and substantial justice" until and unless sufficient minimum contacts with the jurisdiction have been established. *Akro Corp. v. Luker*, 45 F.3d 1541, 1545 (Fed. Cir. 1995).

A. This Court Does Not Have Personal Jurisdiction Over New America Online

New America Online does not have the requisite minimum contacts to support this Court's assertion of personal jurisdiction over this defendant. To comport with the due process requirements necessary to establish personal jurisdiction, FotoMedia must show that New America Online is subject to either specific or general jurisdiction. New America Online does not have anything approaching sufficient continuous and systematic contacts with Texas to establish general jurisdiction. Furthermore, New America Online does not have the minimum contacts with Texas related to the subject matter of FotoMedia's claims needed for this Court to exercise specific jurisdiction over New America Online, because it has no operations or assets. Wychulis Decl., ¶ 5. Accordingly, under Fed. Rule of Civ. P. 12(b)(2), FotoMedia's claims against New America Online must be dismissed for lack of personal jurisdiction.

1. New America Online Is Not Subject To The Specific Jurisdiction Of This Court

New America Online is subject to specific jurisdiction in this court only if: (1) it has purposely directed its activities at residents of the State of Texas; (2) this litigation results from injuries that arose from those activities; and (3) the assertion of jurisdiction over America Online comports with fair play and substantial justice. *Genetic Implant Sys., Inc., v. Core-Vent Corp.*, 123 F.3d 1455, 1458 (Fed.Cir. 1997); *Akro Corp.*, 45 F.3d at 1545-46. The purposeful availment requirement cannot be satisfied by a third party's activities; rather, plaintiff must show "actions by the defendant *himself* that create a 'substantial connection' with the forum state." *Auto Wax, Co. v. Kasei Kogyo, Co.*, No. A 00 CA 531 SS, 2001 U.S. Dist. LEXIS 24023, at *5 (W.D Tex. Sept. 26, 2001) (citing *Burger King Corp. v. Redzewicz*, 471 U.S. 462, 475 (1985)).

New America Online has no operations or assets. Wychulis Decl., ¶ 5. Therefore, New America Online does not have any business activities, in the State of Texas or anywhere else. As result, it could not have directed any business activities toward the residents of the State of

Texas. Moreover, any purported injury to FotoMedia could not have been a result of any activity by New America Online, because there is no business activity in the state related to New America Online. Therefore, FotoMedia cannot show that New America Online meets the purposeful availment requirement nor that it has caused any injury in the State of Texas, and this Court cannot assert specific jurisdiction over New America Online. *See, e.g. Illustro Sys. Int. v. Int'l Bus. Machs. Corp.*, No. 3:06-CV-1969-L, 2007 U.S. Dist. LEXIS 33324 (N.D. Tex. May 4, 2007) (Texas Court does not have general or personal jurisdiction over a foreign corporation with no operations or assets in Texas); *see also Thyssen Stearns, Inc. v. Huntsville Madison County Airport Auth.*, No. 4:01-CV-0601-A, 2001 U.S. Dist. LEXIS 14413 (N.D. Tex. Aug. 30, 2001)(Texas Court does not have specific jurisdiction over Alabama corporation with principle place of business in Alabama that has no assets or operations in Texas); *Phonetel Commc'ns, Inc. v. U.S. Robotics, Corp.*, No. 4:00-CV-1750-R, 2001 U.S. Dist. LEXIS 7233, at *11 (N.D. Tex. June 1, 2001)(Texas Court does not have specific or general jurisdiction over holding company that does not sell equipment in Texas, nor have any assets or operations in the state).

2. New America Online is Not Subject to General Jurisdiction

New America Online is subject to general jurisdiction in this court only if it has "continuous and systematic" business contacts with the State of Texas. *Redwing Shoe Co.*, 148 F.3d at 1359. If a Court cannot find adequate contacts to support a finding of specific jurisdiction, it is unlikely to find contacts sufficient to satisfy the “continuous and systematic” requirement for general jurisdiction. *See Auto Wax Co.*, 2001 U.S. Dist. LEXIS 24023, at *10.

New America Online has never had any operations or assets in Texas or anywhere else. Wychulis Decl., ¶ 5. As a result, America Online cannot and does not have any "continuous and systematic" contacts with the State of Texas, and FotoMedia cannot claim otherwise. Absent a showing of such continuous and systematic contacts with the State of Texas, New America Online is not subject to the general jurisdiction of this Court. *See, e.g. Illustro Sys. Int'l*, 2007 U.S. Dist. LEXIS 33324, at *2 (N.D. Tex. May 4, 2007) (Texas Court does not have general or personal jurisdiction over foreign corporation with no operations or assets in Texas); *see also Phonetel Commc'ns, Inc.*, 2001 U.S. Dist. LEXIS 7233, at *11 (Texas Court does not have specific or general jurisdiction over holding company that does not sell equipment in Texas, nor have any assets or operations in the state).

IV. CONCLUSION

This Court does not have personal jurisdiction over New America Online, because New America Online does not have sufficient minimum contacts with the State of Texas to justify either general or specific jurisdiction. In the absence of such jurisdiction, FotoMedia's complaint against New America Online must be dismissed. For the foregoing reasons, New America Online respectfully requests that its Motion to Dismiss be granted.

Dated: September 17, 2007

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this 17th day of September, 2007.

_____/s/_________________________
Harry L. Gillam, Jr.